NO. 41791-0

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

EUGENE TREMBLE III, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James R. Orlando

No. 10-1-02484-2

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. As the defendant has failed to overcome the presumption of effective assistance of counsel and failed to show how any deficient representation prejudiced his case, should the trial court's denial of a motion for new trial below be upheld?

2. Looking at the evidence in the light most favorable to the State and drawing all reasonable inferences, was there sufficient evidence for the jury to find defendant guilty of assault in the first degree?

3. Should this court reject defendant's claim that the definitional instruction of assault created alternative means unsupported by evidence when the Supreme Court has already rejected such a claim in ***Smith***, where the trial court had given an identical definitional instruction?

B. STATEMENT OF THE CASE.

1. Procedure

The State charged Eugene Tremble ("defendant") with assault in the first degree on June 8, 2010. CP 1.

On December 3, 2010, the State amended the charges, charging defendant with assault in the first degree, adding a special enhancement

for use of a deadly weapon. CP 11. Defense counsel requested a continuance to further review case materials. RP 6-8. The court granted the continuance, setting the date for trial for December 7, 2010. RP 12.

Trial commenced on December 7, 2010. RP 15. Both the State and defendant rested their respective cases on December 8, 2010. RP 203-06.

The court instructed the jury and the jury began deliberation on December 9, 2010. RP 216, 238, 245. The jury returned a verdict shortly thereafter on the afternoon of December 9, 2010. RP 248. The jury found defendant guilty of assault in the first degree. RP 249; CP 40. The jury also found that the assault had been committed with a deadly weapon and that defendant displayed an egregious lack of remorse. RP 249; CP 41, 44.

Defendant filed a motion for relief from judgment and new trial on February 4, 2011. CP 81-86. The court denied the motion. RP 263. The court sentenced defendant to 160 months with an additional 24 month sentencing enhancement for the finding of use of a deadly weapon. CP 91-106; RP 273-76.

Defendant filed a timely noticed of appeal on February 11, 2011. CP 107.

2. Facts

Ms. Uywaijiamaya Smith went to Latitude 84, a Tacoma bar, at approximately midnight on May 13, 2010. RP 180. Ms. Smith testified

that at some point in the evening, she took her drink and went out to the back smoking patio to smoke a cigarette. RP 181. Ms. Smith got into an argument with defendant, whom she did not know, regarding the status of the back door of the bar. RP 184. She testified that defendant took a drink from a glass object and then smashed it against her face. RP 185. Ms. Smith could not recall whether defendant struck her with a glass or a bottle[1]. RP 188.

Ms. Smith testified that her face went numb after the assault and she fell to the ground. RP 188. Several people came to her immediate aid, attempting to stop the considerable flow of blood from the wound. RP 188.

A bar patron informed Ms. Sesilia Thomas, manager at Latitude 84, that something had occurred outside the bar on the smoking patio. RP 32-33. Ms. Thomas testified that she observed defendant come in from the smoking patio and exit via the front door of the bar, leaving a trail of blood. RP 35. She went outside and helped move Ms. Smith to the covered part of the patio. RP 36. Ms. Thomas called 911 and also brought gloves and towels out to the patio. RP 81.

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[1] Ms. Thomas, manager of the bar, identified the glass defendant held in the video as a "rocks glass," the same kind she had served him that night. RP 37-38.

Several minutes after Ms. Thomas called 911, paramedics arrived to assist with Ms. Smith's injury. RP 82. They attempted to bandage her to stop the bleeding. RP 83.

Ms. Thomas testified that Latitude 84 had a video surveillance system which monitors the back patio. RP 87. She watched the video and set a copy of it aside for a police detective to pick up. RP 87-88. The State published the video to the jury during Ms. Thomas' testimony. RP 64-66.

Tacoma Police Detective Robert Yerbury testified that he provided a photomontage to Ms. Smith that included a photo of the defendant. RP 139-40. She identified defendant as her attacker from amongst the photos. RP 139-40. Detective Yerbury arrested defendant on June 7, 2010, roughly twenty-one days after the assault. RP 144. Detective Yerbury testified that at the time of the arrest, defendant had injuries on his hand that Detective Yerbury thought could have been caused from the assault. RP 144-45.

After the attack, Ms. Smith underwent three surgeries to repair the damage done from the assault. RP 189. As described by Dr. Mansour Shirbacheh, one of the surgeons who operated on Ms. Smith, the attack resulted in a severe facial laceration. RP 171. As a result of the injury, Ms. Smith suffered considerable nerve damage. RP 190-91. Dr. Shirbacheh testified that she will never fully recover to a level of functionality equivalent to before the injury. RP 174-75. Furthermore,

Dr. Shirbacheh explained that Ms. Smith had suffered significant vascular injury and bleeding, which could have led to a loss of life. RP 175.

Defendant rested his case without presenting any evidence. RP 203-06.

C. ARGUMENT.

1. DEFENDANT FAILED TO MEET HIS BURDEN OF SHOWING BOTH DEFICIENT PERFORMANCE AND RESULTING PREJUDICE NECESSARY TO SUCCEED ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution, and in Article 1, Sec. 22 of the Constitution of the State of Washington. The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." ***United States v. Cronic***, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* The court has elaborated on what constitutes an ineffective assistance of counsel claim. The court in ***Kimmelman v. Morrison***, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986), stated that "the essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset

the adversarial balance between defense and prosecution that the trial rendered unfair and the verdict rendered suspect."

The test to determine when a defendant's conviction must be overturned for ineffective assistance of counsel was set forth in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by the Washington Supreme Court in ***State v. Jeffries***, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986). The test is as follows:

> First, the defendant must show that the counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment.
>
> Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. See also ***State v. Walton***, 76 Wn. App. 364, 884 P.2d 1348 (1994), *review denied*, 126 Wn.2d 1024 (1995); ***State v. Denison***, 78 Wn. App. 566, 897 P.2d 437, *review denied*, 128 Wn.2d 1006 (1995); ***State v. McFarland***, 127 Wn.2d 322, 899 P.2d 1251 (1995); ***State v. Foster***, 81 Wn. App. 508, 915 P.2d 567 (1996), *review denied*, 130 Wn.2d 100 (1996).

State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 56 (1992), further clarified the intended application of the ***Strickland*** test.

> There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

Citing ***Strickland***, 466 U.S. at 689-90.

Because the defendant must prove both deficient performance of counsel and resulting prejudice, the issue may be resolved upon a finding of lack of prejudice or that counsel's performance was not deficient; both need not be demonstrated to counter the claim of ineffective assistance of counsel. ***Strickland***, 466 U.S. at 697; ***Lord***, 117 Wn.2d at 883-884.

Competency of counsel is determined based upon the entire record below. ***McFarland***, 127 Wn.2d. at 335 (*citing* ***State v. White***, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." ***Strickland***, 466 U.S., at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993), *cert. denied*, 510 U.S. 944 (1993). Defendant has the "heavy burden" of showing that counsel's performance was deficient in light of all surrounding

circumstances. ***State v. Hayes***, 81 Wn. App. 425, 442, 914 P.2d 788, *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996). Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S., at 689.

Defendant raises three primary claims of ineffective assistance of counsel: defense counsel did not show sufficient concern regarding the security video appearing on YouTube; defense counsel had a conflict of interest with a former assault victim of defendant; and that defense counsel did not meet with defendant sufficiently to prepare for trial.

a. Defense counsel demonstrated appropriate concern regarding the jury seeing the evidentiary video on YouTube such that it did not prejudice defendant's case.

The jury first saw the security video of the assault as part of Ms. Thomas' testimony on December 7, 2010. RP 64-66. At the end of the day on December 7, the court instructed the jury concerning outside research done for the case. RP 93. Specifically, the court instructed:

> During the recess tonight, don't talk to anyone about the case. Don't allow anyone to discuss it in your presence. Don't view any news reports or consider any other source regarding this case. *Don't do any kind of Internet research on any site, any social network site, or any other site looking up anything regarding this case.*

RP 93 (emphasis added). The court gave a similar instruction at the end of the day on December 8, 2010, this time including an additional warning regarding YouTube:

> The same instruction continues to apply about not doing any kind of Internet research, not looking up anything on the Internet regarding this case, or any of the issues involved in this case, *including going to any YouTube site that may have been mentioned in this case.*

RP 206-07 (emphasis added). The court properly instructed the jury not to do any research or review anything regarding the case. Barring any indication to the contrary, juries are assumed to follow instructions given to them by the court. ***State v. Gamble***, 168 Wn.2d 161, 178, 225 P.3d 973 (2010).

Defendant argues that "[d]espite the ready access to this internet and in this case video of the alleged incident, the issue of the jury accessing the internet to view this material was not discussed until the case was almost over." App. Br. at 7-8 (citing RP 205). Defendant also argues that any concern for the jury seeing the video came from the State and that "the defense was oddly silent during this discussion." App. Br. at 7. However, the court told the jury not to conduct Internet research regarding the topic at the end of the first day of trial. RP 93. Furthermore, contrary to defendant's assertion on appeal, defense counsel raised the issue regarding the YouTube video at the end of the first day of trial. RP 94. Defense counsel and the court properly addressed the concerns with the jury conducting outside research regarding the case. RP 93-94. The record demonstrates that, in regard to the YouTube video in question, defense counsel did not provide deficient assistance of counsel.

Defendant fails to state how the presence of the video on YouTube or defense counsel's alleged failure to show concern for the video prejudiced defendant at trial. As the court stated, "they have already seen the video so there's no real harm." RP 206. Further, the court specifically instructed the jury not to do outside research, including on YouTube. Given that the court acknowledged that the YouTube video was the same as the video the jury had already seen and, despite that, the court told them not to go look at it, defendant has failed to show how any alleged deficiency by defense counsel prejudiced him during trial.

Defendant failed to show that defense counsel provided deficient assistance during trial regarding the security video appearing on YouTube. Defense counsel appropriately mentioned it to the court at the end of the first day of trial. Furthermore, given the court's instructions to the jury and the fact that the jury had already seen the video as part of the State's case-in-chief, defendant has not demonstrated that any alleged deficiency prejudiced defendant in any way.

b. Defense counsel, having only briefly represented a prior victim of defendant in an unrelated matter, had no obligation to recuse himself in representing defendant in this case

"To justify appointment of new counsel, a defendant 'must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in

communication between the attorney and the defendant.'" ***State v. Vargas***, 151 Wn.2d 179, 200, 86 P.3d 139 (2004) (quoting ***State v. Stenson***, 132 Wn.2d 668, 733-34, 940 P.2d 1239 (1997)). When a conflict of interest adversely affects a client's interests, it may rise to the level of ineffective assistance of counsel. ***State v. Chavez***, 162 Wn. App. 431, 438, 257 P.3d 1114 (2011) (citing ***State v. Regan***, 143 Wn. App. 419, 426, 177 P.3d 783 (2008)).

An attorney's former clients can generate a conflict of interest with the representation of a client. RPC 1.9. "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." RPC 1.9.

The Rules of Professional Conduct clarify that the scope of the matter depends on the circumstances. RPC 1.9 c. 1. "[A] lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client." RPC 1.9 c. 1. Furthermore, matters are substantially related if "they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the

subsequent matter." RPC 1.9 c. 2. The matter at hand must be substantially related to the previous client to invoke the restrictions of RPC 1.9.

Defendant sent a letter to the court on December 2, 2010, in which he expressed concern that defense counsel had previously represented Charity Davis, the mother of one of his children and the victim in an earlier assault trial involving defendant. CP 9-10. Specifically, he informed the court that "[defense counsel] has previously represented my childrens' [sic] mother in a case. She has been a vitim [sic] in one of my previous cases. (Charity Davis)[.]" CP 9. During trial, defense counsel brought this issue before the court. RP 7.

Defense counsel explained to the court that he had been briefly assigned as counsel to Ms. Charity Davis in another case unrelated to defendant. RP 7. However, a different attorney had been assigned to Ms. Davis before defense counsel had any opportunity to speak to her. RP 7-8. Ms. Davis had also been the victim of an assault allegedly committed by defendant. RP 7. Defendant was never charged with that assault, however, as Ms. Davis recanted her complaint. RP 11. The State in the present case informed the court that although Ms. Davis was a potential rebuttal witness, "it's fairly unlikely potential rebuttal." RP 11. Defendant's current assault did not involve Ms. Davis. Defendant has not demonstrated how his attorney's representation of him is materially adverse to Ms. Davis, or how his attorney's former representation of Ms.

Davis on an unrelated matter creates a conflict. Further, given that defense counsel had never spoken with Ms. Davis, his brief representation of her would in no way "materially advance the [defendant]'s position in the subsequent matter." RPC 1.9 c. 3.

Defense counsel's representation of defendant did not violate the Rules of Professional Conduct. Furthermore, no conflict of interest existed requiring defense counsel to recuse himself. In this regard, defendant has failed to show that he received deficient assistance of counsel nor has he demonstrated that any former representation of his attorney prejudiced the outcome of the trial.

c. Defendant has not provided any evidence of defense counsel not preparing an adequate defense or meeting with defendant sufficient to rebut the strong presumption of effective assistance.

When a defendant claims ineffective assistance of counsel, defendant has the "heavy burden" of showing deficient performance in light of all surrounding circumstances. ***Hayes***, 81 Wn. App. at 442. A court on appeal shall be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S., at 689.

On appeal, defendant does not substantiate the claim that defense counsel was ill-prepared for trial, failed to meet with him, or failed to review discovery with defendant. App. Br. at 10-13. The only argument defendant provides on appeal is the argument contained in a letter he

submitted to the court on December 2, 2010. CP 9-10. In the letter, defendant claimed that defense counsel had not communicated with him, interviewed any witnesses, or informed him of any findings. CP 9-10.

At the December 3, 2010, hearing, defense counsel requested a continuance to have more time to work on the case. RP 6-7. In requesting the continuance, defense counsel stated to the court that "[w]e did witness interviews on Wednesday and Thursday. They were fairly extensive." RP 6. This assertion is contrary to defendant's claim. CP 9-10. Defense counsel added further, "I have ten, 15 pages of notes I need to review with my client. I spent as much time as I could with him yesterday." RP 6. This statement is contrary to defendant's claim as well. CP 9-10. Defense counsel also stated that he had recently received a significant amount of discovery and needed time to review it and confer with his client. RP 6-8. Thus, the record indicates that his attorney planned to spend considerable more time conferring with defendant prior to trial. Defendant did not reassert his claim of lack of preparation again before or during the trial. Nothing in the record substantiates defendant's claim on appeal that defense counsel failed to properly prepare for trial or meet with defendant.

A defendant arguing ineffective assistance of counsel has a heavy burden to overcome. ***Hayes***, 81 Wn. App. at 442. Defendant has not met that burden. Defendant has not provided any evidence to properly show ineffective assistance of counsel. Nothing in the record before the court supports the allegation that defense counsel provided ineffective

assistance. Defendant has not provided any information via personal restraint petition to show that critical witnesses were not interviewed or other investigation was not performed. Thus, he has not supported his claim of deficient performance of counsel with evidence nor has he rebutted the presumption of effective representation. Further, he has not demonstrated how any alleged deficient representation prejudiced him at trial. As the court is highly deferential regarding ineffective assistance claims, the presumption that defendant received adequate and effective representation at trial stands. The verdict of the trial court should not be disturbed.

d. Defense counsel represented defendant zealously and effectively throughout the course of the trial.

Claims of ineffective assistance of counsel must examine the entire record below. ***McFarland***, 127 Wn.2d. at 335. Contrary to defendant's claim on appeal, defense counsel did much to aid defendant in his case. Based on the video evidence and the corroborating testimony presented by the State, the only real issue defense counsel could contest was defendant's *mens rea*. To that end, defense counsel focused his case on that element. During closing argument, defense counsel called into question whether or not the State properly demonstrated any intent on the part of defendant, making as strong a case as possible for defendant. RP 230-38.

Furthermore, defense counsel did a great deal both in preparing for trial and during the course of the trial. In preparation for trial, defense counsel proposed a continuance to allow more time to review discovery and confer with defendant. RP 4-13. Defense counsel motioned the court to permit hearsay evidence regarding the extent of the injury to the victim, evidence meant to contradict the State's argument that the victim's life had been in danger. RP 95-97. He also objected to the admission of evidence regarding chain of custodies concerns. RP 97-98. Considering the possibility of the jury seeing the video on YouTube, defense counsel also raised the issue with the court at the end of the first day of trial. RP 94. He also made many objections during trial. RP 4-5, 24-25, 33-34, 44, 143, 144, 203. Defense counsel worked with the court and the State to craft appropriate jury instructions for the case. RP 164-67, 207-14. To this end, defense counsel zealously represented defendant during trial.

The ***Strickland*** rule requires that a defendant show that counsel provided deficient performance based on the entire record below, and that the deficient performance prejudiced the outcome of the trial. 466 U.S. at 687. Here, defendant has shown neither.

2. THE STATE PRESENTED SUFFICIENT EVIDENCE OF ALL THE ELEMENTS OF ASSAULT IN THE FIRST DEGREE SUCH THAT THE JURY COULD FIND DEFENDANT GUILTY.

Due process requires the State to prove every element of a crime beyond a reasonable doubt. ***State v. McCullum***, 98 Wn.2d 484, 489, 656

P.2d 1064 (1983). When examining claims of insufficiency of evidence, the reviewing court must construe the evidence in light most favorable to the State. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Given the evidence, the appropriate standard of review is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***State v. Joy***, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.*, citing ***State v. Partin***, 88 Wn.2d 899, 906-7, 567 P.2d 1136 (1977). Further, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." ***Salinas***, 119 Wn.2d at 201 (citing ***State v. Theroff***, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)). Regarding issues of credibility, conflicting testimony, and persuasiveness of evidence, the review court must defer to the trier of facts interpretations. ***State v. Thomas***, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citing ***State v. Cord***, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)).

The State charged defendant with assault in the first degree pursuant to RCW 9A.36.011(1)(c). CP 1, 11. The statute states that, "A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: ... Assaults another and inflicts great bodily harm." RCW 9A.36.011(1)(c). The court instructed the jury of the four elements of assault in the first degree:

> (1) That on or about May 14, 2010, the defendant assaulted Uywaijaimay N. Smith; (2) That the defendant acted with intent to inflict great bodily harm; (3) That the assault resulted in the infliction of great bodily harm; and (4) That this act occurred in the State of Washington.

CP 22 (Jury Instruction #7). Thus, the State had to present sufficient evidence such that the jury could find each of the four elements of the crime beyond a reasonable doubt.

The first element of the charge of assault that the State must demonstrate in this case is that "on or about May 14, 2010, the defendant assaulted Uywaijaimay N. Smith[.]" CP 22 (Jury Instruction #7). Detective Robert Yerbury testified that the victim, Uywaijaimay Smith, identified defendant as her attacker in a photo montage. RP 140. Ms. Smith testified that she had argued with defendant on May 14, 2010. RP 186. Furthermore, the jury saw the video of the assault in which Ms. Thomas identified defendant as the assailant. RP 64-66. Watching the video, when coupled with the testimony of witnesses including the victim, provided the jury a clear picture of the assault. The jury had sufficient evidence to infer that defendant assaulted Ms. Smith on May 14, 2010.

The State adduced considerable evidence from which to infer that "the defendant acted with intent to inflict great bodily harm[.]" CP 22 (Jury Instruction #7). First, there was evidence of animosity between defendant and Ms. Smith from which the jury could infer that defendant intended to harm her. RP 184-87. After they argued, defendant struck her

twice in the face with the glass. RP 67-68, 186-87. Defendant opted to strike Ms. Smith with an object rather than an empty hand, making it more likely that his blow would cause injury. He also used a glass object likely to shatter and cause great bodily harm. Defendant also struck Ms. Smith twice in rapid succession, allowing the jury to infer that defendant felt he had not inflicted sufficient injury with the first blow. In addition, rather than striking her in the chest or legs, defendant struck her directly in the face, a more delicate and easily damaged part of the body. Given the facts presented to the jury, a rational jury could infer that defendant intended to inflict great bodily harm based on the timing of the attack immediately after a heated argument, the use of a glass as a weapon, and that he struck her twice in the face.

In the present case, the jury must also have found "[t]hat the assault resulted in the infliction of great bodily harm[.]" CP 22 (Jury Instruction #7). "'Great bodily harm' means bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ[.]" RCW 9A.04.110. The State adduced testimony from several witnesses demonstrating the harm caused by defendant's attack. When Officer Terwilliger arrived on the night of the attack, he saw Ms. Smith with a 'pretty severe wound' on the left side of her face that "was bleeding a lot[.]" RP 132. Dr. Shirbacheh, a plastic surgeon, described the lacerations to Ms. Smith's face as "very

significant." RP 171. The injury included damage to Ms. Smith's facial nerve, requiring multiple delicate surgeries to repair. RP 172-73. Her injury included significant vascular damage that resulted in a great deal of bleeding. RP 175. By striking Ms. Smith in the face with a glass, defendant severely lacerated her face, lacerations that caused profound bleeding and permanent nerve damage. Based on the evidence presented, a rational jury could infer that Ms. Smith suffered great bodily harm from the attack.

The final element of the charge of assault in the first degree is "[t]hat this act occurred in the State of Washington." Ms. Thomas, manager of the bar Latitude 84, testified that the bar is located in Tacoma, Washington. RP 30. She also testified that the assault in question occurred on the bar's rear patio. RP 32. She also stated that it occurred on a Thursday night in the middle of May of 2010. RP 33. Ms. Smith testified that she went out on Thursday, May 13, 2010, and that the attack happened after midnight, at approximately 1:00am. RP 180-81. The State presented uncontested evidence sufficient to show that the assault took place in the state of Washington, and that it occurred on or about May 14, 2010.

Many witnesses testified as to the assault that occurred on the morning of May 14, 2010, and of the resulting effects from that attack. The State also presented a security video of the attack that shows defendant attacking Ms. Smith. Considering the evidence in the light most

favorable to the State and drawing reasonable inferences from that evidence, a rational jury could conclude that defendant committed the crime of assault in the first degree against Ms. Smith.

3. THE DEFINITIONAL INSTRUCTIONS GIVEN TO THE JURY, IDENTICAL TO THE DEFINITIONAL INSTRUCTIONS FOR ASSAULT GIVEN IN ***SMITH***, DID NOT CREATE ALTERNATE MEANS OF COMMITTING ASSAULT NOR DID THEY MISTATE THE LAW.

The court will find a jury instruction proper when it properly informs the jury of the law, allows the parties to argue their theories of the case, and does not mislead the jury. ***State v. Barnes***, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005) (citing ***Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160***, 151 Wn.2d 203, 210, 87 P.3d 757 (2004)). "Alleged errors of law in jury instructions are reviewed de novo." *Id.*

RCW 9A.36.011 defines the crime of assault in the first degree. One definition of the crime is: "A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: ... Assaults another and inflicts great bodily harm." RCW 9A.36.011(1)(c). The different statutory subsections of the assault statute have been held as alternate means of committing the crime.

Although statute defines the crime of assault in the first degree, there exists no statutory definition of "assault." The Supreme Court has accepted the common law meaning of assault as an appropriate definition for the word "assault." ***State v. Davis***, 119 Wn.2d 657, 664, 835 P.2d 1039 (1992). Specifically, the Court accepted the definition of assault as:

> (1) intending to inflict bodily injury on another, accompanied with the apparent present ability to do so, (2) intentionally creating in another person reasonable apprehension and fear of bodily injury, and (3) intentionally committing an unlawful touching, regardless whether physical harm results.

Davis, 119 Wn.2d at 664.

"Definition statutes do not create additional alternative means of committing an offense." ***State v. Linehan***, 147 Wn.2d 638, 646, 56 P.3d 542 (2002) (citing ***State v. Laico***, 97 Wn. App. 759, 763, 987 P.2d 638 (1999)). Regarding assault, the court has applied the rule in ***Linehan*** to apply to the common law definition of assault. ***State v. Smith***, 159 Wn.2d 778, 785, 154 P.3d 873 (2007). "[A]ssault definitional instructions do not create additional alternative means of committing the crime of assault." ***Smith***, 159 Wn.2d at 785. Further, "the common law definitions of assault, which we determined in ***State v. Davis***, 119 Wn.2d 657, 664, 835 P.2d 1039 (1992), do not constitute essential elements of the crime, are merely descriptive of a term, 'assault,' that constitutes an element of the crime[.]" ***Smith***, 159 Wn.2d at 788. The Supreme Court of Washington

held that a definitional instruction for assault does not create additional alternative means for committing assault. ***Smith***, 159 Wn.2d at 785.

Defendant alleges that the definitional jury instruction given at trial created uncharged alternate means that the State did not provide sufficient evidence for, leading to an unfair and unjust trial. Considering the definitional instruction given, ***Smith*** controls. In the present case, the jury received several instructions regarding the crime of assault in the first degree indicating the definition of the word "assault." Jury instruction #5 stated that "[a] person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he or she assaults another and inflicts great bodily harm." CP 19 (Jury Instruction #5). Jury instruction #7 provided the "to convict" instruction. CP 22 (Jury Instruction #7). These jury instructions spell out the elements of the crime of assault in the first degree as described in RCW 9A.36.011(1)(c). Similar to ***Smith***, the court here instructed the jury as to only one of the three alternate means of committing assault in the first degree, omitting any reference in the jury instruction to the language of RCW 9A.36.011(1)(a) or (b). *See* ***Smith***, 159 Wn.2d at 790.

To define the term "assault," the court gave to the jury instruction #5a. CP 20 (Jury Instruction #5a). Jury Instruction #5a presented the same common law definition of assault as given to the jury in ***Smith***. ***Smith***, 159 Wn.2d at 781-82. Like in ***Smith***, the instruction served as a definitive instruction which did not add or modify the elements established in the "to convict" instruction, but instead serve to define a term used in an element of the crime. ***Smith***, 159 Wn.2d at 787. Thus, the instruction did not unfairly prejudice defendant.

The jury instructions used here properly informed the jury of the law, allowed both parties to argue their theories of the case, and did not mislead the jury. Therefore, the Court should affirm the judgment of the trial court below.

D. CONCLUSION.

Defendant has failed to overcome the strong presumption of effective assistance of counsel, and he failed to show that any prospective failure prejudiced the outcome. Further, the State provided sufficient evidence when viewed in light most favorable to the State for the jury to

find defendant guilty. The jury instruction provided, consistent with the instruction help acceptable in ***Smith***, neither mislead nor misstated the law. The State asks that the Court affirm the judgment of the court below.

DATED: December 15, 2011.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Andrew Asplund
Rule 9 Legal Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the ~~appellant and~~ appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/15/11
Date Signature

PIERCE COUNTY PROSECUTOR

December 15, 2011 - 4:23 PM

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